In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 994

P. R. MALLORY & CO., INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 23–29) is reported at 400 F. 2d 956. The Board's decision and order (Pet. App. 33–49) are reported at 169 NLRB No. 5.

JURISDICTION

The judgment of the court of appeals was entered on November 1, 1968 (Pet. App. 31–32). The petition for a writ of certiorari was filed on January 29, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

336-129—69

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are set forth on page 3 of the petition.

QUESTION PRESENTED

Whether substantial evidence supports the finding of the National Labor Relations Board that the Company discharged an employee because of his union activities.

STATEMENT

Early in 1966, the Union (International Union of Electrical, Radio and Machine Workers, AFL–CIO) began an organizing campaign among the production and maintenance employees in the Company's plant at Glasgow, Kentucky. The Company was opposed to the Union and actively campaigned against it. See *Mallory Capacitor Company,* 162 NLRB 1404, enforced in part, 389 F. 2d 704 (C.A. 7). An election held on May 11, 1966, was won by the Union by a vote of 253 to 239, with three challenged ballots. On December 5, 1966, however, the Board sustained the Company's objection to the election and directed a second election (161 NLRB 1510). Thereafter, the Company continued to campaign against the Union. The Union lost the second election on December 29, 1966, by a vote of 332 to 317, with four challenged and two void ballots. On September 29, 1967, the Board sustained the Union's objections to that election and directed a third election (167 NLRB No. 89, 66 LRRM 1116). The discharge of employee Darrel B. Van Meter

occurred on January 19, 1967, shortly after the second election.

Van Meter began working for the Company in August 1965 as a machine maintenance worker at a starting rate of $1.35 per hour (J.A. 76; 10, 22).[1] From that time until his discharge, he received five pay increases, which raised his wages to $1.85 per hour (J.A. 76; 10, 22–23). Nothing in the record indicates that Van Meter's work was unsatisfactory or that the Company ever criticized it (J.A. 21).

Shortly after Van Meter was hired, another employee was hired to perform the same type of work at a higher rate, and Van Meter was assigned to instruct him. The raises received by Van Meter had narrowed but not eliminated the gap between his rate and that of the other employee, and consequently, Van Meter believed that he was being treated unfairly by the Company (J.A. 76; 24–25). In December 1966, Van Meter asked the Company for another raise, pointing out that it was difficult to support his family on his wages. He discussed the matter with his foreman, Meador, and with Bill Birl, another Company representative, and was told to wait a month to see what the Company could do about it (J.A. 76; 19–20, 23). In January 1967, he again discussed the question of his raise with Meador and asked Meador to "let me know about it because I was planning on quitting if I didn't get it" (J.A. 76; 20, 23–24).

In mid-December 1966, shortly before the second election, Van Meter became active on behalf of the

[1] "J.A." refers to the joint appendix in the court below.

Union. He began wearing a union button himself and passed out union buttons to other employees in his department (J.A. 77; 11–12).

On January 19, 1967, Van Meter reported for work at 4:30 p.m., wearing his union button. He noticed that the six other employees in his department were not wearing their union buttons, although all had done so previously (J.A. 77; 12–15). Van Meter testified that after an hour or two of work, Foreman Meador said there "was going to be a shortage of material and he was going to have to let the boys go home early and I asked him to tell if that meant me also and he said not necessarily unless I wanted to." When Van Meter said that he "didn't want to go home," Meador replied "that was all right" (J.A. 77; 14–15).

Van Meter then asked the other employees why they were not wearing their union buttons. He spoke to three men, all of whom put their buttons back on, although they appeared "scared". After his conversation with the third employee, Glenn Fudge, during which Fudge had put his button back on, Van Meter noticed that Foreman Meador was observing them (J.A. 77; 15–18).

About a half hour later, at 7:00 p.m., Meador called Van Meter into an "isolated part of the plant." Van Meter described their discussion as follows (J.A. 77–78; 18–19):

> He [Meador] said I asked him to tell me when my raise was due, whatever he would give me, and he told me he understood they turned my raise down and tonight would be a good night

> for you to quit. * * * He said, like I just repeated, I said I would give them two weeks notice when I did and when I decided to quit and he said tonight is when you quit and I said you mean right now? And he said, right now, and then I asked him, I said, I asked him you mean I don't even get to finish the week up and he said, no, and then he picked up the phone beside the desk and called some place and told them that that was it, and I said, I don't even have a way home, I ride with another employee although I could call the wife and he said, well, I'll punch your card out and let you go call your wife and as I was leaving he called to me and said, I'll even go better than that, I'll put on your card that you gave two weeks notice.

After Van Meter telephoned his wife, he asked Meador whether "it would be all right [to tell] the lady I rode with that I would be going home and he said that he would see that she got the message" (J.A. 78; 19) Foreman Meador was not called to testify (J.A. 78).

In view of the Company's anti-union animus and the sudden discharge of Van Meter in the middle of a shift, without any asserted justification and promptly after he was observed encouraging employee Fudge to wear his union button, the Board found that the Company discharged Van Meter because of his union activities, in violation of Section 8(a)(3) and (1) of the Act (Pet. App. 40–41, 34). The Board ordered the Company to offer Van Meter "immediate and full reinstatement" to his job, with backpay from the

date of his discharge to the offer of reinstatement (Pet. App. 46–49, 34).

The court of appeals sustained the Board's findings and conclusions, and enforced its order (Pet. App. 29, 31–32).

ARGUMENT

The essential question presented by the petition is whether substantial evidence on the record as a whole supports the Board's finding that petitioner discharged Van Meter because of his union activities, in violation of Section 8(a)(3) and (1) of the Act. The court of appeals, which has the principal responsibility for reviewing the sufficiency of the evidence, correctly found that the record adequately supported the Board's findings; the issue does not warrant re-examination by this Court. *National Labor Relations Board* v. *Pittsburgh Steamship Co.*, 340 U.S. 498, 502–503; *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490–491.

Contrary to petitioner's contention (Pet. 7), the Board's decision does not permit a finding of a violation of Section 8(a)(3) "without proving antiunion motivation," simply by showing the discharge of a known union adherent, unless the employer demonstrates "a substantial and legitimate business justification for the discharge." In determining the motive for the discharge, the Board properly considered the fact that petitioner adduced no reasonable explanation for abruptly discharging an experienced employee with a satisfactory work record, but the absence of a business justification is not the only factor which the Board

considered. It was only after reviewing all the circumstances surrounding Van Meter's discharge that the Board concluded that the "real motive" therefor was his union activity (Pet. App. 41).

The court of appeals' failure to discuss certain evidence cited in the petition does not support the contention (Pet. 14–19) that the court failed to exercise its reviewing responsibility. The court stated that the relevant issue was "whether the Board's findings are supported by substantial evidence on the record considered as a whole", and it then went on to discuss the more pertinent objections raised by the Company (Pet. App. 23–29). The fact that the court did not discuss every point offered in support of the Company's position does not refute its statement that it was considering the whole record; a reviewing court is not obliged to discuss specifically every contention raised by a party.

Finally, with respect to the Company's attitude of opposition to the Union, the Board did not err in noting an earlier proceeding which in part involved various letters sent to the employees and speeches which the Company made during the election campaigns. The court of appeals had held in that prior case [2] that an unfair labor practice finding could not be based on the contents of the Company's letters because they were privileged under Section 8(c) of the Act. But that does not mean that the Board and the court could not properly consider the fact of the Company's opposition to the Union during the stormy organiza-

[2] *P. R. Mallory & Co.* v. *National Labor Relations Board*, 389 F. 2d 704 (C.A. 7).

tional campaign—as distinguished from the specific contents of the letters themselves—as "'background' against which to measure statements, conduct, and the like made by other management spokesmen * * *." *Hendrix Manufacturing Co.* v. *National Labor Relations Board,* 321 F. 2d 100, 103–104 (C.A. 5). Accord: *United Automobile Workers* v. *National Labor Relations Board,* 363 F. 2d 702, 707 (C.A. D.C.), certiorari denied, 385 U.S. 973. Although a history of opposition to a union cannot alone support an unfair labor practice finding, it may be utilized to shed light on other probative evidence. Past events may be used for this purpose even though they occurred outside the Section 10(b) limitations period. *Local Lodge No. 1424* v. *National Labor Relations Board,* 362 U.S. 411, 416–417.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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